No. 21207

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

LARRY P. SMITH, et al., Appellants,

vs.

HILLTOP REALTY, INC., et al., Appellees,

HILLTOP REALTY, INC., et al., Cross-Appellants,

vs.

LARRY P. SMITH, et al., Cross-Appellees,

and

THE AUSTIN COMPANY,
Additional Cross-Appellee as to Count No. 4 Only.

ON CROSS APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF WASHINGTON

ANSWERING BRIEF OF LARRY P. SMITH, et al., AS CROSS-APPELLEES

RICHARD S. WHITE
GERALD G. DAY
1610 Washington Building
Seattle, Washington 98101

Attorneys for Cross-Appellees
Larry P. Smith, et al.

LSELL, PAUL, FETTERMAN, TODD & HOKANSON
10 Washington Building
attle, Washington 98101
ea Code 206 - MUtual 2-3850

Of Counsel

No. 21207

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

LARRY P. SMITH, et al., Appellants,

vs.

HILLTOP REALTY, INC., et al., Appellees,

HILLTOP REALTY, INC., et al., Cross-Appellants,

vs.

LARRY P. SMITH, et al., Cross-Appellees,

and

THE AUSTIN COMPANY,
Additional Cross-Appellee as to Count No. 4 Only.

ON CROSS APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF WASHINGTON

ANSWERING BRIEF OF LARRY P. SMITH, et al., AS CROSS-APPELLEES

RICHARD S. WHITE
GERALD G. DAY
1610 Washington Building
Seattle, Washington 98101

Attorneys for Cross-Appellees
Larry P. Smith, et al.

SELL, PAUL, FETTERMAN, TODD & HOKANSON
0 Washington Building
ttle, Washington 98101
a Code 206 - MUtual 2-3850

Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

CASES

TEXTBOOKS

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

RRY P. SMITH, et al.,	Appellants,	
vs.		
LLTOP REALTY, INC., et al.,	Appellees,	
———		
LLTOP REALTY, INC., et al.,	Cross-Appellants,	No. 21207
vs.		
RRY P. SMITH, et al.,	Cross-Appellees,	
and		
E AUSTIN COMPANY,	Additional Cross-Appellee as to Count No. 4 Only.	

ON CROSS APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF WASHINGTON

ANSWERING BRIEF OF LARRY P. SMITH, ET AL., AS CROSS-APPELLEES

I. HILLTOP'S FAILURE TO PROVE DAMAGE IN THE SALE OF NUTWOOD DEFEATS ITS ANTITRUST CLAIMS

Hilltop's cross appeal raises two issues. The first is ether the trial judge erred in dismissing on summary judgment lltop's claims of Sherman Act and Ohio state antitrust viola-n (Spec. of Error 1, Op. Br. 17)*. The second is whether the al judge erred in adopting factual findings after trial that

---

*Hilltop's opening brief on its cross appeal is referred to herein as Op. Br. ____, Smith's opening brief on its appeal is Smith Op. Br. _____, the references to various parts of the appendix to Smith's opening brief are the same as explained at Smith Op. Br. 2. Hilltop's answering brief on Smith's appeal is Hilltop Ans. Br. ____.

Smith had fully performed its contract and that Hilltop had failed to prove the conclusions of the Nutwood market analysis to be incorrect, had failed to prove that Nutwood had potentiality as a shopping center site and, hence, had failed to prove that Hilltop was damaged by the sale of Nutwood for $3,500 an acre (Spec. of Errors 2-7, Op. Br. 17-18).

The damages alleged by Hilltop in support of its dismissed antitrust contentions all depend on the proposition that Nutwood was a potential regional shopping center and, as such, worth more than $3,500 an acre. The state and federal antitrust claims of damage were alleged in identical terms:

> "Defendants' wrongful acts were the proximate cause with the foreseeable result of plaintiff's damage in selling Nutwood at $3,500 per acre when its true value was a minimum of $20,000 per acre." (R. 680, 689).

Hilltop recognizes the awkward posture of its antitrust clai on this appeal. It tries to skirt the problem that the trial jud findings as to damage defeat its position by emphasizing that the findings of no-damage were made by a trial judge, whereas it preserved its jury demand as to its monopoly claims, should they be sent back for trial (Op. Br. 21-22). The fallacy of Hilltop's position is clear. The trial court did not weigh the evidence. Rather it found no substantial proof of the fact of damage. If the antitrust claims had proceeded to jury trial, a verdict would have been directed in defendants' favor, for failure of Hilltop to present a substantial fact issue. The court found:

> "The plaintiffs also contended that but for the lack of a favorable market analysis they would have been able to find a buyer for Nutwood Farm who was willing to pay more than did Ridge

> Hills. On the state of the evidence adduced in this case, such contention amounts to no more than speculation or conjecture." (M.D., App. 10).

If a contention of damage "amounts to no more than speculation conjecture", no jury issue is made out. Wolfe v. National Lead , 225 F. 2d 427, 433-34 (9th Cir. 1955), cert. den. 350 U.S. 915 55); see Keogh v. Chic. & N.W. Ry. Co., 260 U.S. 156 (1922). le a jury is permitted leeway in estimating the amount of damage n the fact of damage has been clearly established, if evidence the fact of damage is purely speculative, no question of fact presented. Talon, Inc. v. Union Slide Fastener, Inc., 266 F. 2d , 736-37 (9th Cir. 1959); Peters v. Lines, 275 F. 2d 919, 930-31 h Cir. 1960); McCleneghan v. Union Stock Yards of Omaha, 349 F. 53, 56 (8th Cir. 1965).

Only if this court were to reverse the finding that Hilltop not prove any damage in the sale of Nutwood would the court i to examine the antitrust issues. Dismissal of the antitrust ims would necessarily follow from affirmance of the finding the claim of damage, upon which the antitrust claims rest, ounts to no more than speculation or conjecture". Accordingly, ddress ourselves first to the specifications which do not in- e antitrust.

II. THE TRIAL COURT WAS CORRECT IN REFUSING TO FIND THAT THE "INTRODUCTION" DAMAGED HILLTOP (Spec. of Error 2, Op. Br. 17, 27-31)

Hilltop complains that the trial court's refusal to find that ih's failure to include certain work material in the final draft ts report was a concealment which "resulted in damages to Hill- p (Op. Br. 17). The material was a draft form of "Introduction", duced to Hilltop by Smith during discovery, among other workpapers

for the Nutwood analysis.

Contrary to the dark inferences Hilltop would have this cour draw from the omission of the Introduction from the final version of the analysis, the trial judge found that "Smith fully performe its contract" (M.D., App. 17).

The principal witness who testified on the Introduction was John Marshall, Smith's economic analyst assigned to the Nutwood report. Marshall explained fully why the proposed Introduction was not included in the final memorandum (Tr. 1673-75). The less formal three-page personal letter from Treiger to Petti (Ex. 29, App. 150-52) was included in the final memorandum in lieu of the Introduction when it was decided that the preliminary findings were sufficiently negative as not to justify the further expendit of Hilltop's money for a formal report. (See A.F., App. 59). As we read Hilltop's argument (Op. Br. 27-31) it would have this cou find that Hilltop was damaged because the Introduction postulated Montgomery Ward as a possible prospective tenant for Nutwood, wher as the report did not mention any possibility by name. Yet Petti actually attempted, after delivery of the Smith memorandum, to interest Ward in Nutwood (A.F. No. 335, R. 1257). Ward wrote Petti a polite reply, simply thanking him "for calling this possi bility to our attention" (Ex. 371, p. 266). Hilltop asks this court to reject Marshall's testimony and to assume, against the evidence, that Smith omitted mention of Ward for some vague ulter reason. And, when Hilltop asks this court to find that failure t mention Ward in the Smith report "damaged Hilltop" (Op. Br. 27), it is asking this court to find that Ward would probably have

:ablished a branch at Nutwood if asked in 1960, contrary to its
:k of interest in 1961. The totally speculative character of
: evidence of damage presented by Hilltop is exemplified by its
iim that it was somehow damaged by Smith's inclusion of the in-
mal letter from Treiger to Petti in place of the draft Intro-
:tion.

III. THE TRIAL COURT WAS CORRECT IN FINDING THAT HILLTOP FAILED TO SHOW THAT NUTWOOD HAD SHOPPING CENTER POTENTIAL (Spec. of Error 3, Op. Br. 17, 31-51)

A. The District Judge's Finding That The Nutwood Analysis Contained No Mistakes of Consequence Is A Purely Factual Determination Drawn From Live Testimony

Hilltop asks this court to set aside certain findings as
early erroneous" (Op. Br. 5, 19). F.R.C.P. 52(a) provides
t in determining whether findings are "clearly erroneous",
e regard shall be given to the opportunity of the trial court
judge of the credibility of the witnesses". The trial judge,
n presentation of judgment, observed that Hilltop's counsel was
the less happy position [than Smith's counsel] if he wants to
eal in that his appeal would involve questions of fact." (R.2165)

The trial court held Hilltop's attack upon the Smith report to
unfounded (M.D., App. 10, also see O.O., App. 5-6). As we shall
onstrate, the record shows overwhelmingly that the analysis was
rect. In fact Hilltop's principal expert witness on shopping
ters stated that, with one minor exception, he found no factual
ors in Exhibit 29 (Tr. 1229) and that the Smith methodology was
per (Tr. 1144). The same witness stated that his sole criticisms
the Smith memorandum were the estimates of per capita department
re spending, which Hilltop does not now question, and estimates

of department store effective competition (R. 1229-30). Hilltop's attack upon the report (Hilltop Op. Br. 31-51) thus sifts down to criticism of Smith's estimates of effective competition. This criticism, in turn, amounts to a play on the words "capacity" and "potential" (See Hilltop Op. Br. 33-38). Before we discuss those terms, however, we must refer to what Hilltop calls "major errors" but which the court found to be "inconsequential" (M.D., App. 17). They consist of an apparent incorrect assumption by Smith's field man, Darmstadter, that the Sears store at Shoregate utilized its basement for storage space. This resulted in an overestimation of the store size by 30,000 square feet. The true size of the Shoregate store was well known to Hilltop as early as August, 1958, a year before it hired Smith (A.F. 159, R. 1141, see Petti Tr. 337-38). When Hilltop received the Smith report, Crume, secretary of Hilltop, immediately brought the discrepancy to Petti's attention (Tr. 347). If Shoregate had been measured at 40,000 square feet instead of 70,000, the result would have been to reduce the effective competition to Nutwood from 1,954,500 feet to 1,924,500 feet (Ex. 29, App. 160).

The only other error in Exhibit 29 asserted by Hilltop was a mistake as to the population of Census Tract LC-4. This discrepancy did not have any significant quantitative effect on the conclusions of the Nutwood report (R. 2288). Hilltop does not contend differently. Rather it takes the position that "the falsity of the conclusions of the Nutwood analysis is based almost exclusively on Smith's misuse of its own concept of 'total sales capacity' and 'effective competition' in the report" (Op. Br. 33-34).

In support of its position Hilltop states, "This Court may ıe to that conclusion from the Analysis and its workpapers and ›ositions alone; it does not involve a challenge to ... credi-.ity ..." (Op. Br. 35).

All of the witnesses who testified as to the meaning of "effec-ve competition" and other similar terms appeared in court. They re Marshall, who wrote the Nutwood analysis (Tr. 1667-1712); iger, who was in charge of it (Tr. 2293-2324); Larry Smith*, developed the Smith methodology (Tr. 2326-2453); Steichen, who in charge of the review memo, Exhibit 10, (Tr. 2042-2058); .ly, who was a principal witness for defendants on the Smith hodology (Tr. 2122-2293) and Hilltop's experts, Rienstra (Tr. 2-1305) and Ward (Tr. 1484-1535). While Hilltop did present osition testimony by some of these witnesses in its case in ef and the direct testimony of experts was recorded in advance trial, the fact remains that each of these witnesses appeared the trial and testified in person. The trial judge, therefore, ample opportunity to observe their demeanor and to form his judgment as to their persuasiveness and candor. The simple t is that the trial judge did not accept Hilltop's contentions to the meaning of the Smith concepts of "effective competition" "total sales capacity". When the application of these con-ts in the Smith methodology is understood, the false premise which Hilltop's claims rest becomes apparent. That false mise is that in determining the feasibility of a given site, is improper to consider capacity for effective competition unless re is market potential equal to the capacity. Obviously, if store capacity which is available to compete for a market

This judgment is expressed as a percentage which, when applied to the total sales capacity, provides a dollar figure. The total sales capacity figure does not vary because of the construction of new facilities. It remains constant. Larry Smith testified that discounting of the sales capacity of an existing facility because of the proposed construction of new facilities, as advocated by Hilltop (Op. Br. 40), was a "ridiculous" process of judgment (L. Smith Tr. 2363). Such a procedure would require a series of judgments which would have to be applied against varying assumptions, i.e., the capacity figure being reduced initially and then adjusted upward over the passage of time. The amount of the upward adjustment would depend on population growth and many other factors. This, Smith said, was not a correct application of the methodology he had developed (L. Smith Tr. 2362-63). It was never so applied by Smith in any of the 1,500 to 2,500 similar studies which had been prepared by Larry Smith & Company prior to January 8, 1960, nor in any studies made after 1960 (L. Smith Tr. 2336, Kelly Tr. 2183-84). The Smith methodology has been tested and confirmed by the research departments of major department stores and mortgage lenders all around the world (L. Smith Tr. 2363-64, 2 It is still in use (L. Smith Tr. 2348).

Smith's methodology may be described in brief. The first step is to define a trade area based on the assumption of a regional shopping center at the site under study (Ex. 344; Kelly Tr. 2130-40). Next, the population of the trade area is analyzed and projected for future years. Income levels are determined and per capita expenditure patterns are derived from published sources

elly Tr. 2140-61). The product of population multiplied by per pita expenditures provides estimates of total retail sales po- ntial or total spending likely to be done by trade area resi- nts. This figure is then adjusted downward to account for spend- g in downtown stores. The remaining percentage figure is known suburban share and the dollar amount known as suburban potential elly Tr. 2130-31). After the suburban potential is determined, fective competition is subtracted from the suburban potential ascertain unsatisfied potential. An estimate is then made of e share of the suburban potential for which the site could com- te and conclusions are drawn as to the size, type and character the facilities justified (Kelly Tr. 2131). Under Hilltop's eory -- that effective competition could never exceed suburban ential -- it would be impossible ever to reach a negative con- sion. Its error is simply that it confuses retail sales poten- l and retail sales capacity. Potential is the amount of dollar nding that will be available within a given area. Capacity, on other hand, is a measure of the capability of existing retail ilities at normal levels to absorb what potential may exist . 29, App. 169). To say that capacity could never exceed poten- l is to argue that a market could never be overbuilt or that no re would ever be built in expectation of future market growth. hypothetical example of a department store in the Mojave Desert erred to in the testimony illustrates the point (Tr. 1052). In t illustration, the capacity of the store exists, but the potenti ld be non-existent.

Hilltop charges that analysis of Exhibit 11, a "work book" Severance, shows that "'total sales capacity' as that phrase is

1013-14, Marshall Tr. 1708-09, 1696). Contrary to Hilltop's sugge tion (Op. Br. 40), it would be entirely illogical in the applicat of the Smith methodology to decrease "effective competition" on t theory that construction of the site under study would make it im possible for existing centers to compete as before. As Kelly sai such a procedure would be "a bootstrap lifting operation by which the analyst assumes the answer before he begins" (Tr. 2185). The goal of the residual method is to determine how much unsatisfied potential exists for which the facility under study can compete, or, put another way, to test the ease with which a new facility might enter a market area (Kelly Tr. 2185, 2131). Once the unsat isfied potential is determined, then and only then is it appropri under the residual method to estimate what part of that potential might be satisfied by the new center. This step in the process, undertaken only in a positive analysis, is known as determining t "center share" (See Ex. 29, App. 158, 161).

The residual method is not to be confused with the "share of the market" test, which Smith uses, and used in the Nutwood analy as a cross-check against the residual approach. The impact of co struction of the facility under study is considered in the "share of the market" test, which is based on an assumption that a given department store tenant will attract a given "share of the market irrespective of other department store competition (L. Smith Tr. 2346-48, Kelly Tr. 2131-32, Ex. 29, App. 161-62). For example, May Company in Cleveland, if it opened a branch in an area where it was not represented, "would be able to compete for a given sh of the total suburban market of the trade area, more or less, re gardless of the extent of other competitive facilities already

erving the area." (Ex. 29, App. 161).

Hilltop next refers to Marshall's lack of experience to make he study (Op. Br. 41). Yet his credentials were imposing. Before oining Smith, he had earned a master's degree in the economic ield from the University of Iowa (Tr. 873), and had worked on he research staff of a St. Louis department store chain preparing conomic reports for five years (Tr. 874). He felt that among imilar studies he had conducted while with the Smith firm, Nut- ood was relatively simple because there was only one site under tudy (Tr. 914-15). He was the Smith employee who made the econ- mic judgments as to effective competition, uninfluenced by anyone lse in or out of the Smith organization (Tr., App. 88-90), and withou ny knowledge that his employer had any possible proprietary in- erest in Severance (Tr., App. 92).

Hilltop attacks Marshall's professional judgment in estimating hat Severance would be 50% effective within the Nutwood trade rea (Op. Br. 41-43), i.e., that 50% of Severance's capacity would e attributable to residents of the Nutwood trade area. Hilltop's laims are not supported by the record. For example, Hilltop tates that Marshall testified that the effective competition for everance shown in Exhibit 176 related to the year 1962 (Op. Br.). Actually Marshall said that "the capacity of the store is t for a fixed date. It extends through time" (Tr. 1696). Hill- p urges that using population and income levels, in Hilltop's inion the only two relevant factors, Marshall could not have come with a figure for effective competition in excess of 30% (Op. . 42). However, Hilltop has ignored Marshall's testimony as to w he actually measured effective competition. He testified that

the factors he took in consideration were distance from the Nutwood site, size of competing facility and the strength of the competing facility. For facilities which represented substantial competition, trade areas were sketched to see how far those areas impinged on the Nutwood trade area. Marshall then made his estimates of the competition taking into account the size of the trade area, the extent of the overlap, the population and income levels, the strength of the competitive locations, whether the population was inboard or outboard* and other matters (Marshall Tr. 1668-69, 1708-09).

Hilltop's position that only population and income should be considered in assessing effective competition conflicts with the testimony of Marshall, Kelly and other witnesses that population and income levels are only part of the equation and are to be weigh with other factors (Marshall Tr. 1668, Kelly Tr. 2175-76). Marshall's assessment of effective competition cannot be attacked by looking at only one piece of the equation.

There were no unusual problems and the methodology Marshall employed was the same used in other studies on which he had worked (Tr., App. 89-90). Marshall's estimates represented his professional judgment as to the proper percentages to be applied to total sales capacity (Tr., App. 90). His judgment was concurred in by both Imus and Treiger upon review (Marshall Tr. 1670-72).

The fallacy of Hilltop's reasoning is illustrated by its tabl entitled "Effective Competition within Nutwood Farms Trade Area" (Op. Br. 44). Hilltop points out on page 45 that despite the fact

*The terms "inboard" and "outboard" were defined in the Nutwood analysis (Ex. 29, App. 169) and were explained by Larry Smith

at all the suburban potential has been taken up by the effective
mpetition of facilities other than Severance that Severance "was
pected to take between 53% to 81% of the entire 'suburban share'".
lltop then claims this is impossible. The term "suburban share"
presents the percentage of an estimated volume potential (Ex.
, App. 169). What Hilltop's table does show is that under Smith's
sidual test, even if Severance were ignored, there was insuffi-
ent potential to justify locating a department store at Nutwood
rms, since the effective competition excluding Severance (item 4)
substantially greater than the suburban share for Secondary B,
ual to it for Secondary A and practically equal to it for the
imary trade area. In simple terms, there was no discernible
portunity for a department store at Nutwood.

Hilltop's attack on Marshall's judgment as to the "'effective
mpetition' attributed to Cedar Center ..." (Op. Br. 45-46) is
sed on misstatements of what Marshall did to arrive at his con-
usions with respect to the May Company store at Cedar Center.
Marshall testified he drew a trade area for the May Company
sed on the size of the facility and its strength (Tr. 1668-69).
did not know whether the trade area he used was exactly the
me as the trade area for the May Company store shown in Exhibit
5, a Severance feasibility study made in 1955 (Tr. 1691). Mar-
all weighed many factors, including outboard-inboard density,
arriving at a figure of 38%.

Hilltop's attack upon this conclusion is based on the unsupport-
assumption that the trade area shown for the May Company in Ex-
bit 105 is identical with the one Marshall had drawn. It assumes
estimate of overlap population of 15.9% made by its own

witness Ward. But, as Kelly testified, the map in Exhibit 103 shows an overlap in area of 45% to 50% of Cedar Center into the Nutwood trade area, which confirms the 38% estimate (Kelly Tr. 2190).

Hilltop also cites a license plate study undertaken in 1959 by Smith in the May Company parking lot (Op. Br. 45). This study is the one relied upon by Hilltop's witness, Dr. Rienstra, as the number one reason that his findings "differ radically with those of Smith" (Ex. 330, p. 6). Upon cross examination, he shamefacedly confessed that he had misplotted and misinterpreted the study (Tr. 1277, see Tr. 1264-69). Whereas Dr. Rienstra had believed when he prepared Exhibit 330 that only 3% of the May Company patronage came from the Nutwood trade area, correct interpretation of the data showed that 26% came from the Nutwood trade area (Tr. 1277). If one considers future population growth, increase in income levels, the inboard-outboard influence and the other criteria utilized by Marshall, the soundness of the 38% estimate is apparent. In fact, if one applies the premise used by the Ward firm of which Rienstra was senior partner (Tr. 1133) that the effective competition from Cedar Center would increase 3-1/3% a year, one arrives at the same figure of 38% (Ex. 330, p. 19). As the court pointed out, the result follows naturally from this premise (Tr. 1289), for if one starts with the 26% impact in 1959 and projects it on a straight line basis to 1974, the mid-point of the Nutwood center's projected life, using the 3-1/3% yearly increase estimated by Ward, one would come up with almost exactly 38%, the average effective competition estimated by Smith.

Hilltop's "final illustration", cited on pages 46-47 of its rief, is but another example of how Hilltop distorts the Smith oncepts. Hilltop repeatedly labors the mistaken assumption that nder Smith methodology the Shoregate Sears store would do a volume f $2,800,000. Under the definition of total sales capacity, horegate would be capable of doing that volume under normal com- etitive conditions. Being capable of doing business means just hat. It does not mean that $2,800,000 is a fixed estimate of olume at any given time for Shoregate.

In comparing the $2,800,000 "total sales capacity" of the 0,000 square foot Shoregate Sears store with the 1962 volume stimate of $2,801,000 for a department store at Nutwood (Ex. 29, pp. 161), Hilltop has improperly mixed the residual and share f the market tests. The former figure is the total capacity of 40,000 square foot store; the latter is the share of the market hich a department store could achieve in 1962 at Nutwood, assuming, rrespective of effective competition, it could attract 10% of the arket. If a figure for capacity, comparable to the $2,800,000 igure for 40,000 square foot Shoregate, were desired for a 50,000 square foot Sears store at Nutwood, it would be $10,500,000 150,000 x $70.00/ sq. ft.). But this would represent about 37% f the total Nutwood trade area department store potential of 28,010,000 in 1962. Because of the location and strength of xisting stores and their market position in Cleveland, Marshall elt that there was no store available to Nutwood which would chieve a 37% share of the market. The May Company was located n the area with a huge new facility at Cedar Center. Higbee and

Halle were announced for large branches at Severance. Together these three stores were first preference among downtown stores of 88% of Cleveland consumers (R. 1455). Hilltop had already tried to get Sears to locate at Nutwood. But Sears, with its new store at Shoregate, just north of Nutwood (Location 1 on map, Ex. 29, App. 159) was not interested (R. 1141, 1155, Petti Tr. 335-36). Hilltop also tried after the sale to Ridge Hills to interest Sears, with no effect (R. 1260, Petti Tr. 436).

Hilltop criticizes the "Review Memorandum" of Nutwood which Smith prepared after Hilltop had questioned the original study (Op. Br. 48-49). The purpose of the review was to test the validity of the Nutwood memorandum in the light of any new materials or data which had become available since the analysis was made, and to review the assumptions and judgments made in the original report (Steichen Tr. 1059). It was prepared in December, 1960 (Ex. 161) some eight months after Nutwood was sold to Ridge Hills, under the direction of a Smith senior associate who did not participate in the original study (Steichen Tr. 943). Hence, whatever the merits or demerits of the review memo, it could not conceivabl have caused Hilltop or the sisters any damage. Moreover, when the asserted "errors" are viewed against the purpose of the study, they reveal the insubstantial nature of Hilltop's criticism. For example, Hilltop asserts that the trade areas shown in Exhibit 10 do not conform exactly with the statement that they represent 85% of the total customer samples (Op. Br. 48). The purpose of compa ing the trade area for Nutwood used in Exhibit 29 with trade area for regional centers which had been built was to demonstrate with material available from Smith Company files that the Nutwood trad

rea in Exhibit 29 was of a sufficient size to be a satisfactory
rea for testing the feasibility of developing a regional center
: Nutwood (Steichen Tr. 1059-60). Steichen testified in detail
ıy the several trade areas were selected, and how they contributed
› the limited object of testing the size of the Nutwood trade
rea used by Smith (Steichen Tr. 1059-68). One illustration should
ıffice. Hilltop complains that in Exhibit 10 one-half of the
›hysical extent" of a comparable trade area was omitted (Op. Br.
-49). The center in question was Southdale, near Minneapolis.
eichen used a trade area, for comparison with Nutwood, based on
license plate study undertaken at Southdale after it opened,
ther than the trade area used to analyze the feasibility before
was constructed (Steichen 1065-67). Hilltop's criticism of
e of a trade area drawn from actual experience rather than one
veloped in pre-construction planning is unfounded.

Hilltop argues that the construction of two major centers,
eat Lakes Mall and Richmond Mall, within the Nutwood trade area,
oves the incorrectness of Smith's conclusions (Op. Br. 50-51).
advancing this contention, Hilltop neglects to inform this
urt that the developer of Great Lakes Mall, Edward J. DeBartolo
r. 361), turned down the Nutwood location in November, 1959 (Tr.
1), that the May Company, chief tenant at Great Lakes Mall, chose
at site over Nutwood (Tr. 347-48, 425-26), and that the major
nants at Richmond Mall, Sears and Penney, also rejected Nutwood
ee R. 1250). But more important, Hilltop forgets that the study
ith made was of Nutwood, not of the Eastern Cleveland suburbs
elly Tr. 2176, Ex. 29, App. 150). Hilltop thus asks the court
assume, contrary to common sense, that the lack of potential

at one given location automatically means there is no potential at any other location within a trade area. Smith made no market studies of Great Lakes Mall, about eight straight line miles east from Nutwood (at Mentor, shown on map, Ex. 29, App. 159, also see Tr. 1283) and about twelve miles from Cedar Center (see Ex. 29, App. 159, point "4" northeast to Mentor). Obviously, the level of competition at the latter site would be greatly below that at Nutwood.

Hilltop's statement that Melvin Roebuck, an expert witness for Smith, "found considerable potential for Nutwood in 1970" (Op. Br. 50) provides a good example of Hilltop's misuse of the record. Roebuck in fact found from his independent study that the Nutwood location "could not support a regional center by 1970", and that the estimated space needed for a department store at Nutwood in 1970 was 29,000 to 44,000 square feet, whereas the minimum size of a department store for a regional shopping center is by definition 150,000 square feet (Tr. 1918, Ex. 29, App. 168).

The trial judge's findings that the conclusions of the Nutwood analysis were unassailably correct is borne out overwhelmingly by the record. Smith was only one of many skilled analysts to decide that Nutwood was not suitable for regional shopping center purposes. Unknown to Smith, when it undertook the analysis, all of the Cleveland developers and department stores had already reached the same conclusion.

IV. THE UNAVAILING EFFORTS FROM 1958 TO 1965 BY HILLTOP, THE SISTERS AND RIDGE HILLS TO DEVELOP ANY INTEREST IN NUTWOOD AS A REGIONAL SHOPPING CENTER DEMONSTRATE THE CORRECTNESS OF EXHIBIT 29 (Spec. of Errors 3 and 4, Op. Br. 51-56)

Hilltop boasts that all experts found Nutwood to have excellent tential as a regional shopping center (Op. Br. 52). Yet the Nutod site had been rejected before Smith was hired by every person Cleveland knowledgeable of shopping centers. These experts re not evaluating Nutwood to prepare themselves to testify. ey weighed Nutwood with a view of determining whether it offered em a reasonable business opportunity as a regional shopping cen-r. These department stores and real estate developers constitute e court of last resort as to the potential of shopping centers. eir collective opinion with no dissent registered speaks more oquently than all of the expert testimony. In the appendix to r brief in support of our appeal we included a resume of the tempts from 1958 to 1962 to stimulate interest in Nutwood as a opping center (p. 173-76). To prevail on any aspect of this peal, Hilltop must upset the trial court's negative findings to what Hilltop claims to be the "excellent potential" of Nutod (Op. Br. 51). Hence, we shall review the record on this score some detail.

In the Cleveland metropolitan area in 1958 when Hilltop mmenced its representation of Nutwood there were only a few ople who might develop a regional shopping center, which by finition contains a department store of more than 150,000 square et (Ex. 29, App. 168). Among the department stores, the big ree were The Higbee Company, which at that time had no branches,

Halle Bros. Co., and The May Company (R. 1455). William Taylor Company, a May Company affiliate, and Sterling-Lindner-Davis, an Allied Stores affiliate, were more remote possibilities. Finally Sears, which was then constructing a new store at Shoregate, was an additional prospect. Among the developers, Petti testified that two family groups dominated the scene, the Visconsis and the Ratners (Tr. 2505-07). In addition, there was Edward J. DeBartolo of Youngstown, reputed to be the largest shopping center developer in the Midwest (Petti Tr. 358).

Let us consider in turn each of these prospects in terms of their response to Hilltop's aggressive efforts to interest them in Nutwood.

A. Higbee

The Hilltop exclusive agreement was approved by the sisters on Tuesday, July 29, 1958 (A.F., App. 36). On the following Friday Petti and Crume met with Herbert Strawbridge, the responsible officer of Higbee, and presented him with various data concerning Nutwood. Strawbridge informed them that Higbee was "not committed anywhere", and agreed to inspect the site (R. 1139).

Crume and Petti met again with Strawbridge on Thursday, August 4, 1958, at which time Strawbridge told them Higbee would explore the possibilities of Nutwood (Ex. 371, p. 36, R. 1140). Petti testified that in his opinion Higbee's gave full and fair-minded consideration to Nutwood (Tr. 333-34). Strawbridge visited and inspected the Nutwood site with Petti and Crume on September 12, 1958. On that occasion he told them that Higbee was making its own study of the eastside market (Ex. 371, p. 47).

On January 28, 1959, Petti wrote to O'Neill that he had

esented Nutwood to an investment broker, who reported to Petti at he had discussed Nutwood with the President of Higbee, who d said that "as far as The Higbee Company is concerned he would finitely not be interested." (Ex. 371, p. 72-74).

On Sunday, February 22, 1959, the Cleveland Plain Dealer nounced that Higbee was going to build a branch at Severance .F., App. 37-38). The next day Crume wrote to Hilltop's site nsultant that in view of the announcement that Higbee would in Halle at Severance, consideration would have to be given to ss area for retail development at Nutwood (A.F., App. 38-39, . 506-07).

Several conclusions may be drawn from the foregoing:

1. Hilltop had "a clear shot" to persuade Higbee to select twood for a branch.

2. Higbee management was familiar with the Nutwood site be- re reaching the decision to go to Severance. Hilltop had given gbee aerial photos, maps, overlays, geological studies and other ta on Nutwood on August 1, 1958 (R. 1139-40).

3. Hilltop knew in February, 1959, almost a year before the ith report, that Higbee had selected Severance. When it hired ith, Higbee's commitment was an accomplished fact, which Hilltop d considered in its own planning (See Hilltop Ans. Br. 19, where is is admitted).

On August 3, 1959, Petti wrote O'Neill that he understood at Higbee "has already or is very close to signing a lease at ngwood [Severance]" (A.F., App. 43).

After the sale to Ridge Hills Petti again attempted to intere Higbee in Nutwood. He furnished the company with an elaborate bro chure, Exhibit 239 (Tr. 427). Petti had no response other than a polite letter from Strawbridge (Tr. 431, R. 1251).

B. Halle

Hilltop approached Halle Bros. Co. in December, 1958, to induce Halle to locate at Nutwood. Walter Halle, Jr., president of the company, wrote to Hilltop on December 31, 1958, declining any interest in Nutwood (R. 1148). Petti reported this turndown to O'Neill (Ex. 371, p. 74).

Ralph Walton, operating vice president of Halle, testified as to the long history of his company's interest in Severance which he said was "the strongest potential center of any in Metropolitan Cleveland." (Tr. 2066). Among its attributes were, "a 360-degree circle around it where you had dense population." (Tr. 2067).

Walton also testified that he received a continuous stream of requests to consider locations at the rate of two or three a week. He stated that he could not remember any feasibility report by Smith on Severance. He was interested in Severance before Smit was engaged by Austin (Tr. 2065, 2070). As to Halle's knowledge of its own customers and market, he said:

> "... I am only saying in Halle's I feel I know about our customers, who they are, where they live, and particularly in Cleveland, because we have a tremendous number of accounts, up in the several hundred thousand of charge accounts, and I have absolute data on these charge accounts. I know exactly how much they bought by census tract and I have had studies of these made for many years, and so I don't think Larry Smith or anybody else could come

in and give me as much information about our customers and where they live and how much they buy and how much their income is as I could know myself." (Tr. 2070-71).

Quite evidently Halle's did not consider the Nutwood location have sufficient merit to require any personal inspection or alysis.

In February, 1959, as already noted, the Cleveland papers rried the news that Halle, along with Higbee, would locate a anch at Severance (A.F., App. 37-38).

C. May Company

In 1958, The May Company opened its branch at Cedar Center, e largest branch store in Metropolitan Cleveland (Ex. 209B, p. ; see Ex. 29, App. 160). On August 4, 1958, Strawbridge of the gbee Company told Petti and Crume that the May Company "would obably not be interested [in Nutwood] because of its store at dar-Center." (R. 1140). This opinion was amply borne out by e later efforts of Hilltop to get May to locate at Nutwood. ese efforts commenced prior to the Smith report with conversa-ons by Petti with Sam Rosenberg, then president of the company, d Frank Coy, Rosenberg's assistant who later became president the company. They visited Nutwood with Petti. Petti testified at he felt the May Company would give fair-minded consideration locating at Nutwood (Tr. 347-48).

After the sale to Ridge Hills, Hilltop put on a concerted ive to interest the May Company in locating at Nutwood. It epared an elaborate brochure, Exhibit 235, dated June 29, 1960, r presentation to the May Company. It followed up by getting rry Ratner to arrange for a personal conference with Coy. Coy

came to the Hilltop office where Petti made his sales talk from a large aerial photo. Coy disagreed with Petti's estimates of the distance between Nutwood and the Cedar Center. Petti later called Coy to inquire as to the company's reaction to the brochure. Petti assumed from Coy's comments that May had made an economic analysis of the Nutwood trading area. Petti heard nothing further from the May Company as to these talks (Tr. 421-25).

On June 14, 1961, Petti wrote to David May in Los Angeles stating that he had been talking to Coy about Nutwood. Petti expressed his "firm belief that our location is a 'blue collar', and a middle income area as compared to your Cedar-Center location which caters to people in a much higher income bracket. I see little conflict as each of the trading areas is distinct in itself" (A.F., App. 87-88).

On July 11, 1961, David May thanked Petti for sending him a Nutwood brochure and said that, "if we have any interest we will correspond with you further" (Ex. 371, p. 272). Petti understood that the May Company was considering three alternative sites which he felt were probably Shoregate, Great Lakes Mall and Nutwood. Petti heard a rumor from Albert Ratner, who was trying to get the May Company to Shoregate that May had decided on Great Lakes Mall. Some years later, in late 1963 or early 1964, he read the announcement in the papers that the May Company was building at Great Lakes Mall (Tr. 425-26).

The foregoing review shows:

1. Petti staunchly maintained from 1958 or 1959 through June 1961, despite the Larry Smith report, that Nutwood did not conflict with Cedar Center.

2. Neither Rosenberg, Coy nor David May shared Petti's ew. Obviously, the company which, like Halle's, must have lt that it knew its own customers and market better than any tsider, leapfrogged out to Great Lakes Mall, a location far ss competitive with Cedar Center than Nutwood.

3. According to Fenton's report, Exhibit 334, the May Company id almost $32,000 an acre in 1955 or 1956 for its Cedar Center te (Addendum, Comparable Sale No. E). It must seem strange to e court that a company as successful as the May Company would ss up an opportunity to buy Nutwood for $3,500 an acre if it were od potential as a regional shopping center site! Of course, the swer is:

(a) Cedar Center was already a firmly established shopping strict in a densely populated, high income area, and

(b) Cedar Center, as the Smith report indicated, is so direct- competitive with Nutwood that the May Company would not consider twood.

D. Sears

The ink was hardly dry on the July 29, 1958 agreement between llltop and the sisters when Petti and Crume commenced pursuit of ears as a potential purchaser of Nutwood. On August 4, 1958, ey met with James Griffin, a Sears official. According to their morandum of the meeting, one of Griffin's "prime interests" was e relation of Nutwood to Shoregate, then under construction (R.1141)

On March 7, 1959, Petti sent Griffin a written summary giving e Nutwood story and soliciting Sears evaluation of "the great tential of our Nutwood Development" (R. 1155-57).

On July 10, 1959, Petti met with representatives of a Cleveland investment group, which included Griffin, to discuss the possibility of "financing a development corporation through public sale of stock" (R. 1184).

Petti agreed that he pursued Sears "fairly aggressively" whil acting for the sisters, until the property was sold to Ridge Hills and "would have no reason to believe that they would do anything but give fair-minded consideration". He believed that Griffin had sent one of his assistants to look at Nutwood (Tr. 336).

In September, 1961, during Hilltop's exclusive representation of Ridge Hills, Petti wrote again to Griffin, enclosing a Nutwood brochure and soliciting the Sears Company's interest in Nutwood for location of a store (R. 1260). (This was, of course, several years before Sears later decision to locate at Richmond Mall. See correspondence between Sears and Glazer-Marrotta attached to Comparable Sale No. C of Exhibit 334).

Referring to his contacts with Sears, Petti said:

"Q. Did you do that [contact Sears] then?

"A. I believe we did, yes.

"Q. With what effect?

"A. The same effect. I got no response from anybody." (Tr.

E. Sterling-Lindner-Davis

Sterling-Lindner, an affiliate of Allied Stores Corporation, had a downtown store in Cleveland at the time the Smith report was made. It had not established any branch anywhere up to the time of trial (Petti Tr. 352).

On July 15, 1959, Petti wrote to Sidney Galvin, representati of Allied, trying to interest him in Nutwood. Despite Petti's

tive pursuit (R. 1177, 1184-85), Sterling-Lindner made no pro-
sal to locate a branch at Nutwood (Petti Tr. 353).

F. William Taylor Son & Company

On November 22, 1958, Petti sent David H. Scholl, vice presi-
nt and general manager of William Taylor Son & Company, various
ta on Nutwood, including an aerial photo, site plan and isochron
driving time chart (R. 1144-46). At that time Taylor was a
bsidiary of the May Company. Later the May Company absorbed
e Taylor Company, so that the former Taylor stores are now branches
the May Company. Again, Petti had no response from Scholl and
ylor never expressed any interest whatsoever in locating a branch
Nutwood (Petti Tr. 351-53).

G. Other Department Stores

After going to work for Ridge Hills, Petti sent Nutwood bro-
ures to various other department stores, junior department stores,
riety chains and discounters with no significant response. These
cluded Montgomery Ward & Co. (R. 1257), Interstate Department
ores (R. 1257), J. J. Newberry Co., Allied Stores, W. T. Grant,
W. Woolworth Co., J. C. Penney Co. (R. 1250), Shopper's Fair
ores, E. J. Korvette, R. H. Macy & Company, Inc. and several more
. 1258).

About the most encouraging response was from Penney, which
d only junior department stores in Cleveland at that time. Penney
ote to Petti that "at the present time the entire area is rather
arsely populated and it would be quite some time before the de-
lopment you mentioned takes place" (R. 1250). Other than this,
e responses which Petti got consisted of polite acknowledgments
.g., Ex. 371, p. 240, 241, 266).

H. Developers

Petti testified that:

> "Actually the situation in 1959 and 1960 in greater Cleveland area there were only two professional shopping center developers. They were namely the Ratners, not the one that I sold the property to, and the Visconcci [Visconsi] family" (Tr. 2505).

The record shows that in addition to the Visconsis and the Ratners, Edward J. DeBartolo was a good prospect to develop a shopping center in eastern Cleveland. According to Petti's testimony, DeBartolo was reputed to be the leading shipping center developer in the Mid-West (Tr. 358). The record shows that each of these three knowledgeable developers was actively pursued by Petti in his attempts to sell Nutwood.

i. Visconsi

Ralph Walton of Halle Bros. Co. referred to Tony Visconsi as "Mr. Shopping Center in Cleveland because of his age and the years he has spent in it ..." (Tr. 2065).

Within ten days after signing the agreement of July 29, 1958, Petti got in touch with the Visconsis:

> "Mr. Henry Petti discussed Nutwood informally with Dominic Visconci ([Visconsi] as a means of stimulating interest in the property and to feel out the thinking of developers. Made tentative arrangements to fly over the area with him and to discuss the property in more detail" (R. 1141).

On January 28, 1959, Petti wrote to O'Neill of further efforts to negotiate with the Visconsis (Ex. 371, p. 73).

On September 14, 1959, Petti wrote to O'Neill of Visconsi's interest in a competing site:

> "I understand that Visconsi and the Ratners ... are working together on a large tract at Shaker and Richmond Roads. You might recall that this

was the one in which Halle's had a strong interest a couple or three years back. We have heard from pretty reliable source that Halle's and Sterling-Lindner-Davis are showing interest in the site at this time" (Ex. 371, p. 110).

On September 29, 1959, O'Neill wrote in a file memorandum:

> "Petti said also that Galvin told him that Halle's have indicated an interest in the Visconsi and Ratner proposed development at Richmond & Shaker, even if Halle's also goes into the Severance-Taylor-Mayfield site" (Ex. 371, p. 117).

Thus it appears that despite Petti's efforts extending back August, 1958, the Visconsis never expressed any real interest Nutwood. Surely, if Tony Visconsi, "Mr. Shopping Center" of eveland, felt that Nutwood had any merit he would have been ceptive to Petti's pursuit.

ii. Ratner

Petti distinguished between two "factions of Ratners", th of which were large-scale land developers. One faction, head- by Harry, eventually bought Nutwood (Tr. 368-70, Tr. 2505-07). e other Ratner faction already owned or controlled many shopping nters in Eastern Cleveland, including Shoregate and Goldengate. ey informed Petti that they were having trouble with their centers the area (Tr. 369). They had tried unsuccessfully to lure the y Company (Tr. 426) and Halle (Tr. 2071) to Shoregate, two miles om Nutwood. In August, 1959, the Ratners, in declining interes- Nutwood, told Petti that "the shopping center market is saturated" x. 371, p. 107). Speaking of the Visconsis and the Ratners, and rticularly of his attempts to interest them in Nutwood, Petti said:

> "These people felt that there were too many centers in that area and they were not interested" (Tr. 2506).

Hence it appears, according to Petti's own testimony, that the developers in the Cleveland area reached independent judgments that Nutwood was not a good site for a regional center. As Petti put it in an August, 1959 memo, the Ratners "insisted that it [Nutwood] cannot support retail or commercial development." According to Petti, they reached this conclusion on the same ground as the later Smith analysis, that the effective competition exceeded the foreseeable need.

Besides Visconsi and Ratner, there was one other possible developer-prospect for Nutwood, namely, Edward J. DeBartolo, who had no centers in Cleveland but was interested in invading the market.

iii. DeBartolo

On September 29, 1959, O'Neill wrote in a memorandum of Petti's efforts to negotiate with DeBartolo of Youngstown (Ex. 371, p. 117). For the next two months, Petti pursued DeBartolo ceaselessly to try to arouse his interest in Nutwood. Petti and O'Neill, in fact, decided not to employ Smith, following Treiger's visit with them of October 8, until DeBartolo's site engineers made an independent study of Nutwood (R. 1193, A.F., App. 49).

Just how Hilltop can argue seriously that an affirmative report by Smith would provide some open sesame to development of Nutwood is a mystery. DeBartolo told Petti that he "would rather have his own site engineers report on the possibilities than any of the location experts with whom we had had communications" (A.F. App. 48-49).

In fact, DeBartolo's men told Petti unequivocally that they weren't interested in an outside feasibility study (Petti

360). Petti also said as to Harry Ratner that,

> "... I don't think he'd have paid any more attention to the [Smith] report than the man in the moon" (Petti Tr. 380).

So, O'Neill and Petti decided to wait for DeBartolo's pro-
sal based on the report of his own site engineers. Petti gave
Bartolo an oral option on Nutwood. DeBartolo's engineers told
:ti that he had himself a deal (Petti Tr. 358-59). This deal
volved a joint venture in which Nutwood was valued at $3,500 an
:e. Petti told Treiger that a national developer, who turned
: to be DeBartolo, had been given until November 10, to make a
:m proposal (A.F., App. 49). On October 16, 1959, O'Neill wrote
: sisters that DeBartolo was making his own study and might make
roposal (Ex. 371, p. 130).

On October 19, O'Neill, Petti and Vincent Aveni of Hilltop
rneyed to Youngstown to discuss Nutwood with DeBartolo's engineers
l lawyers. DeBartolo's site engineer told them they would proceed
:h a full feasibility study and would outline "the kind of de-
lopment that would be warranted at least initially" (Ex. 371,
132-133). O'Neill wrote the sisters on October 27 that DeBartolo
ild submit "a preliminary proposal ... within a few weeks..."
:. 371, p. 136).

On November 13, O'Neill wrote a memorandum that Petti had
eceived no proposal from the DeBartolo people" (Ex. 371, p. 139).

On December 3, O'Neill wrote the sisters that Petti had re-
:ted to him that "... DeBartolo has been fussing around about
ther development in Mentor" (Ex. 371, p. 140).

On December 4, Petti wrote O'Neill, "Both the Ratner group
l Edward J. DeBartolo are still 'talking' interest in Nutwood"

DeBartolo never made an offer for Nutwood (Petti Tr. 361). In fact, DeBartolo never indicated to Petti that his people ever made a study of Nutwood (Petti Tr. 362). Rather, on December 14, 1959, DeBartolo bought the Great Lakes Mall site for $2,627 an acre (Petti Tr. 361, Ex. 340, Appendix F. No. 11). Petti had understood at the time that DeBartolo was interested in putting together a shopping center at Mentor (Petti Tr. 361). Obviously, DeBartolo, who had an option to purchase Nutwood in October and November, 1959 weighed it against Great Lakes Mall and purchased Great Lakes Mall without even making any proposal on Nutwood.

On January 28, 1960, after he had received the Smith report and had received Harry Ratner's offer, Petti wrote again to DeBartolo recommending that he bid on Nutwood. In the same letter, Petti referred to the Smith report as "a very enlightening study", and offered to make it available to DeBartolo (A.F., App. 72). Petti never had any response from DeBartolo to his offer to make the Smith report available (Petti Tr. 361).

The only conclusion which can be drawn from the Hilltop-DeBartolo "negotiations" is that DeBartolo, who was "the developer owner of upward of thirty (30) shopping centers in northeast Ohio and Pennsylvania" (Ex. 371, p. 126, 127) had reached the same conclusion as The Higbee Company, The May Company, The Halle Brothers Company, Sears, the "Shopping Center" Ratners, the Visconsis, the twenty-five other real estate developers Hilltop pursued (Resume, App. 173-76) and, incidentally, Larry Smith and Company, that Nutwood was not a good site for development of a major retail center.

Unless the court reaches a conclusion different from that reached by the department stores, discounters and developers whom

i Nutwood was a good retail site, Hilltop cannot prevail on any eory.

I. Nutwood Lacked Business Potential, The "Overriding" Ingredient of a Successful Shopping Center

Hilltop claims that irrespective of the judgments of Nutwood department stores, developers and the Smith firm, Nutwood had cellent potential under criteria laid down by Larry Smith in a ok co-authored by him (Op. Br. 52-54). Of the eleven criteria oted by Hilltop, ten relate to the physical characteristics of site. However, the first criterion is:

> "1) The site must be located in the general area established as most desirable by the economic survey."

page 39, the authors say as to this first consideration:

> "1) Location of Site. We mention again that the correct location from the point of view of business potential is of overriding importance" (Ex. 368).

This is just common sense. A beautiful site in the Mojave sert might satisfy the remaining criteria. Nutwood, while not a desert, was deficient in business potential. It had too few ople, too much competition and no logical prospect for a major nant.

We do not mean to say by the foregoing that Nutwood was an eal physical location. In the eyes of a major department store e fact that about one-half of the area from which Nutwood would rmally be expected to draw its patronage was deep in Lake Erie ee plate one of Smith Op. Br.) might be a sufficient reason per to pass it by.

J. Freeway Access to Nutwood Was Purely Speculative In 1959-60

Another problem with Nutwood was that accessibility from the

freeway spur was dependent upon whether the Bureau of Roads would approve a four-way interchange near the property. This approval was still conjectural when the sisters sold to Ridge Hills. Smith analysis found that access to Nutwood would be excellent if the interchange were built (Ex. 29, App. 154), but counseled against development of the property until the highways were built (Ex. 29, App. 152).

After the Smith report was delivered to Hilltop a new federal order on spacing of interchanges appeared to doom the ramps at Nutwood. It was panic upon learning of this order which caused the sisters to sell when they did.

On January 20, 1960, Petti wrote to O'Neill relaying the misgivings of some of his prospects "as to if and when the spur becom a reality" (A.F., App. 62-63). On February 17, 1960, two days before Mrs. Ashcraft wrote O'Neill from Gibraltar of her serious doubts as to the wisdom of selling to Ridge Hills (Ex. 371, p. 171-172), the Cleveland Press announced in a headline, "New U. S. Rule Seen as Dooming Freeways" (R. 1294). This meant no ramps for Nutwood, since the Bureau of Roads was requiring interchanges to be two miles apart and an interchange was certain for Euclid, a main artery just north of Nutwood (R. 1231; for location of Euclid see Ex. 29, App. 153). O'Neill frantically cabled and wrote Mrs. Ashcraft that the Ratner offer should be accepted immediately, before the Ratners realized the implication of the new order (R. 1231-32). On March 1, when details of the new order were made public (R. 1295), Petti called O'Neill in full panic stating that the "whole diamond at Bishop Road [Nutwood] might be ruled out under the new policy" (R. 1233-34). The day before, in response to

Neill's urgent cable and letter, Mrs. Ashcraft had cabled her thorization to accept Ratner's offer (Ex. 371, p. 178). Three nths later O'Neill was still gloating to the sisters that he d put one over on Ratner in getting him to pay $613,000 [$3,500 acre] with the ramp only a possibility (R. 1243).

K. Rezoning of Nutwood Was Purely Speculative in 1959-60

Still another problem which inhered in Nutwood was zoning. 1960 Nutwood was zoned residential (Op. Br. 54-55). Hilltop uld now have the court believe that modification of zoning was foregone conclusion (Op. Br. 54-55). Hilltop forgets that in January 20, 1960 letter to O'Neill it stated that associates th whom it had talked expressed doubts about the rezoning which lltop characterized as "basic and real" (A.F., App. 62-63). It rgets also its previous experience in enduring a long and tedi- s ordeal to obtain rezoning for a shopping center, only to have e plan defeated by referendum (Tr. 278). Petti admitted that lue for shopping center purposes is created by rezoning (Tr. 278).

Hilltop also overlooks the litigation experience which defeat- a regional center at Beachwood, near Severance. See Berger v. n Sweringen Co., 95 O.L.A. 325, 200 N.E. 2d 489 (1964); (see Wal- n Tr. 2069) and the zoning litigation which kept Severance in e courts for several years (R. 1061).

On the possibility of rezoning Nutwood, Hilltop refers to the stimony of Martha Tyler (Op. Br. 55). Our motion to strike Mrs. ler's testimony was not passed on by the trial court, because found in Smith's favor on Nutwood's claimed potential as a pping center (M.D., App. 10). Our motion was well taken. First,

Mrs. Tyler's testimony (Tr. 302-19) was proscribed under the rule that a public officer may not impeach and explain the record of official acts. 32A C.J.S. 152, Evidence §810b, Lillions v. Gibbs, 47 Wn. 2d 629, 632, 289 P. 2d 203 (1955), Seattle v. Parker, 13 Wash. 450, 43 Pac. 369 (1896). The minutes, resolutions or other official records are the only proper evidence of these proceedings. Moreover, Mrs. Tyler's testimony as to whether the Willough by Hills Council was favorably disposed toward granting commercial zoning for part of Nutwood (Tr. 307) was inadmissible as hearsay and as an attempt to speculate as to the future course of official action. State Roads Comm. v. Warriner, 211 Md. 480, 128 A. 2d 248 254 (1957).

Except for the testimony of Mrs. Tyler, Hilltop presented no evidence as to the probability of rezoning. Its reference (Op. Br. 55) to the testimony of its valuation witness Fenton, as showing reasonable likelihood of rezoning, is without any supporting record reference. None could be made. Hilltop's reference to Exhibits 201-9 and 201-4 (Op. Br. 55) support no conclusion stronger than that the Willoughby Hills Council at an "informal meeting" on July 7, 1959 looked with favor upon commercial development of a portion of Nutwood.

L. The Independent Survey of Nutwood By Roebuck Confirmed Smith's Negative Conclusions

Hilltop boasts that Melvin Roebuck, a Smith expert witness, "was an expert witness for Hilltop" (Op. Br. 55). Since the court found against Hilltop on the issue to which Roebuck's testimony was directed, if Roebuck's testimony supported Hilltop's position, the judge was evidently not persuaded by it. Hilltop's strained

ffort to convert Roebuck's findings into an endorsement of Nut-
ood is thus of little moment. The trial judge found, from the
elter of facts and expert opinions presented as to Nutwood's po-
ential as a shopping center, that Hilltop had failed to prove
s contentions (M.D., App. 10, O.O., App. 5, 9)

The invalidity of Hilltop's claim that Roebuck's testimony
mehow supported its position lies mainly in its neglect to dis-
inguish Roebuck's finding of potential of total retail area at
utwood by 1970 of 286,000 square feet and his finding that of
his total, "at best I could find around 44,000 square feet for a
epartment store" (Tr. 1917-19). To put this testimony in per-
pective, it is necessary to understand its background.

In his study of Nutwood Roebuck applied techniques developed
y the Cleveland-Cuyahoga County Regional Planning Commission.
hen he testified, Roebuck was Director of Research and Planning
or the Greater Cleveland Growth Board (Tr. 1897). He was pre-
iously chief planner for the Cleveland-Cuyahoga County Regional
lanning Commission and had served as a consultant to various
overnmental agencies (Tr. 1900-02). While with the Planning Com-
ission he was responsible for the program, methods, collection
f data and writing of Suburban Business Centers (Ex. 209b) and
s Technical Supplement (Ex. 209c). These two reports, which
ere prepared in 1956-58 (Tr. 1911) but released to the public in
ly, 1960 and late 1961, respectively (Tr. 1903) were supported
y $80,000 to $90,000 of county and federal funds. They were in-
nded to develop the existing pattern of shopping center acti-
ty in suburban Cleveland and to forecast future space needs in
tail categories (Tr. 1904).

From some 35,000 consumer interviews, Roebuck and his staff determined that in suburban Cleveland each family supported 45 square feet of retail space, consisting of 30 square feet in suburban business centers and 15 square feet in other retail facilities (Tr. 1906).

Roebuck was asked by counsel for Smith to make an independent study of Nutwood to determine whether in his opinion, based on data available in January, 1960, the site would support a regional shopping center by 1970 (Tr. 1912). He had never read or seen Exhibit 29 (Tr. 1916-17). Using the materials and methods developed in the earlier studies, Roebuck defined a trade area for Nutwood and determined the "net supporting families" available to the site from that trade area (Tr. 1914-16). These areas and the net supporting families are shown on Exhibit 341 by census tract.

Roebuck found that his net supporting families would support only 286,110 square feet of total retail area at Nutwood, which would include convenience goods stores, personal services and shopping goods store types (Tr. 1916). Plainly, a total of 286,11 square feet at Nutwood by 1970 could not fulfill Roebuck's initial assumption that a regional center at Nutwood would "be one that is a minimum of a half million square feet ..." (Tr. 1913). Since his assumption of a department store at Nutwood was for one with a minimum size of 150,000 square feet, and he could find only 44,000 square feet of department store potential, his ultimate conclusion was that the Nutwood trading area could not support a regional shopping center by 1970 (Tr. 1918).

Hilltop's statement that Roebuck's 1970 retail potential of 286,110 feet was <u>after</u> discounting facilities constructed between

50 and 1965 is in error (Op. Br. 55-56). For the statistical
:a used in preparation of Exhibit 341, Roebuck "flashed back
:o history and did it as of 1959" (Tr. 1913). He did, however,
:identally review shopping center and population developments
ıce 1961 (Tr. 1914). Contrary to Hilltop's claim, Roebuck's
ıdy of Nutwood was not "radically more favorable than Smith's
ılysis" (Op. Br. 57). Smith also found general retail potential
: Nutwood in 1970. But, as Roebuck confirmed, very little of
.s was department store potential. To illustrate from Exhibit
5, the Smith Nutwood workpapers, the fourth paper down on the
ft-hand side shows some $14,801,000 of unsatisfied food potential
: the Nutwood primary by 1970, $1,835,000 worth of potential for
ırniture and Appliances", $2,087,000 worth of "Drugs" potential,
: only $122,000 of "Department Store" potential (See Ex. 29, App.
3). In fact, Smith's conclusion to Hilltop was that "a neighbor-
)d center (i.e. one featuring convenience goods, primarily) can
developed at the subject location" (Ex. 29, App. 152). What
:wood lacked, as Smith and Roebuck found, was sufficient depart-
ıt store potential by 1970 to justify the development of a re-
)nal shopping center.

V. THE TRIAL JUDGE WAS CORRECT - HILLTOP FAILED TO PROVE THAT THE VALUE OF NUTWOOD EXCEEDED $3,500 AN ACRE (Spec. of Errors 4, 5 and 6, Op. Br. 58-68)

The trial court found that Hilltop failed to prove that but
the lack of a favorable market analysis it would have been
)e to find a buyer willing to pay more than $3,500 an acre for
ıwood (M.D., App. 10). The court was not persuaded by the testi-
)y of Hilltop's expert on valuation, Fenton, that the property

was worth more than Ridge Hills paid (M.D., App. 10). Hilltop attacks the court's observation that Fenton's testimony was founded on hindsight and on comparable sales which were not probative of Nutwood's value (Op. Br. 58). This court's review of the trial court's action on this phase of the case is to determine whether the findings were clearly erroneous. We called the trial court's attention to the many deficiencies in Fenton's testimony in a motion to strike Fenton's opinion as to value (Tr. 1476). The trial court, because of its conviction that Hilltop had not proved Nutwood to be worth more than $3,500 an acre, found it unnecessary to rule on our motion (M.D., App. 10).

The four basic shortcomings of Fenton's testimony were:

1. His valuation was founded in major part on developments subsequent to the valuation date of January 8, 1960, in violation of the rule stated in Standard Oil Co. of Calif. v. Moore, 251 F. 2d 188, 221 (9th Cir. 1957), cert. den. 356 U.S. 975 (1958).

2. His valuation was founded in major part on facts not in evidence, again in violation of the rule stated in Moore at page 221.

3. His valuation was based upon the assumption of changes in use and zoning, contrary to Olson v. United States, 292 U.S. 246 (1934); United States v. Benning, 330 F. 2d 527 (9th Cir. 1964 and 4 Nichols, Eminent Domain, p. 245, Section 12.322[1]. These authorities require that valuation be based upon existing use and zoning. The possibility of change may be considered but may not be assumed.

4. His valuation was based upon speculation as to future policies of the Bureau of Roads, and was, therefore, improper

er such cases as Polson Logging Co. v. United States, 160 F. 712, 717 (9th Cir. 1947), and United States v. Cooper, 227 F. 357 (5th Cir. 1960).

We will review these improprieties in the order stated.

A. Fenton's Valuation Was Based In Major Part on Hindsight

Fenton's testimony of valuation depended upon his finding t the highest and best use for Nutwood was for regional shop- g center purposes (Tr. 1408). He stated that all of the factors out in his written appraisal, Exhibit 334, influenced in some sure his valuation (Tr. 1408). That this appraisal was found- principally on hindsight may be seen from the following review reof:

Page 1.

(A) The "Location of the Property" speaks as of 1965, not January 8, 1960 (Tr. 1409).

(B) Fenton relied for his assumption that Nutwood was a "prime regional shopping center site" upon a report by Joseph B. Ward & Associates which was written in 1965 and which itself depended on driving time surveys made in 1965 on roads not in existence in 1960, and documents, such as Retail Watersheds, Exhibit 330, published after January, 1960.

Page 2.

The population figures relied upon by Fenton were from the 1960 census, which was not available on January 8, 1960 (Tr. 1415-16).

Page 3.

Access was described in the present tense over roads not

in existence on January 8, 1960. Further, access from the proposed Euclid Spur to the property was described in the present tense as by "a full diamond interchange" which was not the fact on January 8, 1960 (Tr. 1417-22).

Page 4.

"There are many subdivisions building up around the propert to the south and east...." Fenton had no idea how many of these subdivisions were in being in January, 1960 (Tr. 1417 18).

Page 4.

"Utilities, in 1960 were to the property, although not to the extent that they are now." Fenton had no familiarity with the extent to which the property was served by utilities in January, 1960 (Tr. 1423-31).

Page 4a.

Fenton's plot plan of the property showed 1965 zoning. He indicated on page 5 under "Zoning" that the 1960 zoning was for "suburban residential uses". Yet he testified that he purposely did not investigate any properties as potential comparable transactions which were so zoned (Tr. 1468-69).

Page 5.

After reciting that "As of the day of inspection the south portion of the tract ... is zoned either for commercial or light industrial and research park uses," he concluded, "Thus, it is presumed that the zoning would have been no impediment to putting the land to its highest and best use. Obviously, Fenton was strongly influenced by the hindsight

of later rezonings.

Page 5.

Again, under "Highest and Best Use", Fenton spoke in the present tense, in terms of 1965 access, population, commuting tolerances, etc.

Page 6.

Fenton drew broad inferences from the construction of Severance and Great Lakes Mall, both of which were built after January 8,.1960. He also referred to Richmond Mall which had not even been considered by January 8, 1960.

Page 7.

Again, Fenton referred extensively to construction of Richmond Mall, Great Lakes Mall and Severance, all much later events.

Page 8.

In the first full paragraph Fenton referred to what the present owners of Great Lakes Mall felt their property was worth. Further, Fenton referred to the Smith-Austin agreement on Severance of February 10, 1960.

Page 9.

Again, Fenton referred to construction of Severance, Richmond Mall and Great Lakes Mall, all of which occurred after January 8, 1960, and made sweeping comparisons and conclusions.

Page 11.

In the second full paragraph Fenton spoke of Nutwood as "located at the junction of the two great freeways serving the East Cleveland area, on a traffic interchange, and that

the other three corners of the interchange do not have the unity of ownership nor the zoning, nor as good identification with the freeway as does Nutwood." All of this spoke as of 1965, not January 8, 1960.

Addenda to Exhibit 334.

Of Fenton's comparable sales, only "A" (Great Lakes Mall) and "E" (May Co.) are pre-January 8, 1960. Even as to Great Lakes Mall, Fenton applied a liberal dose of hindsight. He stated, "It is interesting that the owner now says the land is worth about $50,000 an acre," and wrote that the "Zoning" was "Commercial". Although this would seem to relate to December 14, 1959, Fenton testified that it related to 1965 zoning (Tr. 1451). He did not even know whether the Great Lakes Mall property was rezoned to commercial before or after January 8, 1960 (Tr. 1451-52).

Comparable Sale No. B involved the purchase by Sears of a site in the Richmond Mall Shopping Center on December 20, 1963, almost four years after January 8, 1960. Not content with four years of hindsight, Fenton relied on later hearsay in stating, "... 350,000 square foot Sears unit being built a part of the Richmond Mall Shopping Center," referring to to July 1, 1965.

Comparable Sale No. C involved an assemblage of many tracts for the Richmond Mall Shopping Center. Of the twenty-one (21) transactions listed by Fenton, sixteen (16) were in 1964, two (2) were in 1963 and three (3) were in October, 1962. Fenton wrote as to "Zoning" - "Property has been rezoned from residential to business and commercial" but

was vague as to dates when this was accomplished as to individual parcels (Tr. 1453).

As to Comparable Sale No. F, Severance, Fenton stated, "This property is now developed into the finest shopping center in the Cleveland area." Despite the fact that Fenton on direct referred to Severance as his chief comparable (Tr. 1382-83), he had the mistaken idea that the Severance rezoning was not accomplished until 1960 (Tr. 1454-55). Actually, the property was rezoned for shopping center purposes in 1954, before the first transaction referred to by Fenton under Comparable Sale No. E (A.F., App. 30).

In his "Supplementing Appraisal", Exhibit 334A, dated July 19, 965 (the trial started July 20, 1965), Fenton presented twelve ages of additional hindsight. For example, he compared the Nut- ood assessed values of 1960 and 1965 and stated,

> "It is interesting to note that the land in Willoughby Hills is recognized as having changed in character, in the fact that the assessed value has tripled since 1960. The land in Wickliffe has been considered as rather residential or institutional, that north of the spur being in close proximity to a college while that south of the spur behind the Sohio Gas Station being platted for residential purposes. This platting has been partially implemented with grading and water lines, but I am informed by Mr. William Bendfelt, City Engineer for the City of Wickliffe, that the City is being petitioned for a change in zoning to accommodate a major motel and restaurant operation to be built by Stouffer's." (Ex. 334A, p. 1).

The references to a Sohio Gas Station, platting, grading and ther possible improvements of the property were all to events ince 1960, or to rumors of future events (Ex. 334A, p. 1).

Page 2 of Exhibit 334A is a mixture of hindsight, corrections

and inadmissible hearsay. In the first category, Fenton amended his acreage by deducting 26.24 acres. This was the acreage actually taken for the Euclid Spur in December, 1960. Obviously, the acreage of taking could not have been known in January, 1960 (See Tr. 1434-35).

On pages 3-4 under the heading "Zoning", Fenton stated:

> "Zoning - The information on zoning as given on Page 5 of the appraisal [Ex. 334] is garbled. Present zoning in the Willoughby portion of the tract being divided between business in the south portion and multiple family in the north portion. The Wickliffe portion south of the freeway remains zoned residential, but an application is being made for a revision to business, a change which Mayor Beebe says will be welcomed."

None of this zoning information would have been available to an appraiser in January, 1960.

On page 4, Fenton referred to "a strip development, such as appears to be developing" at Nutwood and to present zoning of the other three corners of Chardon and Bishop. Next, Fenton reported conversations with a variety of people who purportedly theorized with him as to what different course events at Richmond Mall, Severance and Great Lakes Mall might have taken "had Nutwood been underway". This unsworn hearsay, based on purely speculative hindsight, is what Fenton used to make his vaulation.

Next Fenton analogized from Nutwood in Cleveland to Northgate Shopping Center in Seattle. This court recently frowned on this type of cross-country comparability in Fairfield Gardens, Inc. v. U.S., 306 F. 2d 167, 171 (1962).

The foregoing review supports the district court's finding that Fenton's testimony was based on hindsight (M.D., App. 10). Fenton's valuation opinion was most certainly based "in part upon

ertain events, facts and business developments occurring subse-
ent to that [valuation] date." As held in Standard Oil Company
Moore, 251 F. 2d 188, 221 (9th Cir. 1957), such a valuation is
proper and inadmissible.

B. Fenton's Valuation Was Based Largely on Facts Not In Evidence

In reaching his opinion Fenton drew freely from facts not in
idence. Many of these facts were doubly objectionable as per-
ining to events occurring since the critical date of January 8,
60. An example is the Homer Hoyt report on the Richmond Mall
te, referred to by Fenton on direct (Tr. 1356). This report was
epared in March, 1964 (Tr. 1476). Fenton referred to the "glow-
g feasibility report from Mr. Homer Hoyt" (Tr. 1384). While this
mment was stricken on our motion (Tr. 1398-99) Fenton's valuation
s obviously based in part on the report, which is not in evidence.

Fenton's use of improper evidence is typified by his "Supple-
nting Appraisal". This exhibit was neither offered nor even
rked while the witness was on the stand. Thus, we were deprived
the opportunity of cross examination. In that exhibit Fenton
ibly related purported conversations with the City Engineer of
ckliffe (page 1), the mayors of Willoughby Hills and Wickliffe
age 2 and bottom of page 3), Charles Knight (page 4), a Mr.
nzinger (pages 4 and 10), a Mr. Marotta (page 4), and a Mr.
stariana (pages 5-11).

Fenton's complete lack of understanding of the proper use of
mparable transactions is demonstrated by his reference to and
e of the taking by the State of Ohio of part of Nutwood for
ghway purposes (pages 7-8 of Exhibit 334A). This "comparable",

which the witness did not include in the transactions exchanged before trial, became the keystone of Fenton's "revised" appraisal of $2,500,000. He used it directly in his appraisal of 39.48 acres of Nutwood on page 9 of his Exhibit 334A.

It is axiomatic that transactions involving prospective condemnors are inadmissible, unless very careful foundation is laid. See cases gathered at 85 A.L.R. 2d 163-173 (1962). Fenton did not state whether he had talked to either the State of Ohio or to Ridge Hills Development Co. (called "Ridgeway" by Fenton on page 8) to determine whether the amount of consideration paid was influenced by the fact that the grantee was a condemning authority. Also, Fenton ignores blithely the fact that the part taken by the State included all of the Euclid Avenue frontage which was already zoned to support 180 apartment units (A.F., App. 79, Ex. 348A, p. 3).

Another puzzling aspect of Fenton's "revised" appraisal is the fact that he stated "The appraisal should have been, and I don't know how these blind spots hit you, but the appraisal should have been of 132 ... acres ..." (Tr. 1432-33), whereas in his Exhibit 334A, page 9, he appraised the full 174 acres.

Still another inconsistent aspect of Fenton's testimony was his insistence that he made no investigation of residential transactions:

> "Q. Now, I believe I asked you a question about whether you incident to this winnowing process which you testified to on direct examination had found any sales of residential real estate in the Greater Cleveland area, restricting ourselves to the Nutwood trading area, of more than thirty acres which have been sold at $3,500.00 an acres before January 8, 1960, didn't I?
>
> "A. That's right.

"A. No, I didn't, Mr. White, I didn't look for any residential sales of any kind.

****

"Q. Did you find any such transactions?

"A. No, I don't know of any. I didn't look for any.

THE COURT: You mean when you were in Cleveland you didn't look for any?

"A. That's what I mean, your Honor, I didn't look in Cleveland for any residentially-zoned properties" (Tr. 1468-69).

Yet on page 8 of Exhibit 334A Fenton states, "It appears from e investigation made of this period of time, that the residential rket was something above the $3,500 paid by the Ridgeway Develop-nt Company, but not above the amount paid by the State."

How could Fenton state on July 19, 1965, that the "residen-al market was something above the $3,500 paid by the Ridgeway velopment Company ..." and state on July 29, 1965, under oath, at he found no residential transactions above $3,500 an acre be-use he did not investigate transactions involving residential operty? Either Fenton made no investigation of residential ansactions, in which event his reference to the residential rket is unsupported, or he made an investigation and testified lsely. In either event his opinion as to the value of Nutwood s based on facts not in evidence.

C. Fenton's Valuation Was Based on Improper Assumptions as to Potential Use and Rezoning

The impropriety of valuation testimony founded on assumption rezoning and potential use of the property based on rezoning is where better stated than in Nichols, Eminent Domain, p. 245-246, c. 12.322[1]:

> "An important CAVEAT to remember in applying the rule is that the property must not be evaluated as though the rezoning were already an accomplished fact. It must be evaluated under the restrictions of the existing zoning and consideration given to the impact upon market value of the likelihood of a change in zoning."

One of the cases most frequently cited in support of this proposition is United States v. Meadow Brook Club, 259 F. 2d 41 (2nd Cir. 1958). There the property to be valued was zoned residential, but the property owner had filed a petition for rezoning to industrial use before the valuation proceeding was commenced. At the trial the property owner sought to establish the value of the tract as industrial property. The trial judge considered:

> "'[t]o what extent the possibility or probability of a change [in zoning] would affect the value as of the date of taking' and stated only the obvious when it said that such effect 'is dependent upon the degree of probability, the imminence of the change, the effectiveness of the opposition, and other factors which are largely speculative and conjectural.' D.C.E.D. N.Y. 149 F. Supp. 749, 752." (259 F. 2d 41 at 44, Footnote 2).

The Court of Appeals affirmed. Its holding was as follows:

> "Just compensation compatible with the requirements of the Fifth Amendment is the fair market value of the condemned property just prior to the taking. [citing cases]. This evaluation should reflect not only the purpose for which the property has theretofore been used, but other uses which might render it more profitable. Olson v. United States, 292 U.S. 246, 54 S. Ct. 704, 709, 78 L. Ed. 1236. It would be improper to value the property as if it were actually being used for the more valuable purpose." (259 F. 2d at 44-45) (Emphasis added)

The court rejected the property owner's contention that the property should have been valued "as if it had already been rezoned for industrial use ... because of the alleged imminence of such rezoning." (259 F. 2d 41, 45).

The Meadow Brook case was cited with approval in United States Benning, 330 F. 2d 527, 532 (9th Cir. 1964). This court said ere:

> "... The Government correctly points out that a potential future use of condemned property should be considered not as the present measure of value but only to the extent that the prospect of demand for such use would have affected the price a willing buyer would have offered for the property just prior to the taking."

Now let us review Fenton's testimony in the light of these tablished rules. In short, did he weigh the possibility of ning change and regional shopping center use as a factor in aching his valuation or did he assume that the property was tually being used for the more valuable purpose or would be in e immediate future?

First, let us look at Fenton's appraisal, Exhibit No. 334. page 2, he says:

> "Thus, it is assumed that the Nutwood Farms property on the date of appraisal was a regional shopping center site, with enough retail trade available to it to make it a success at that time, and that this was known to the trade through a highly responsible feasibility study, whose conclusions were favorable and which recommended immediate development.
>
> "This assumption includes the fact that as of January 8, 1960, so far as was known, there was available for this site an adequate department store tenant, such as the May Company, Sears Roebuck, Federal Department Stores, Higbee and Halle, or others."

On page 5, under "Zoning", he says:

> "Thus, it is presumed that the zoning would have been no impediment to putting the land to its highest and best use."

On Page 12, he says:

> "On the basis of the above, it is my opinion, therefore, that the value of the Nutwood Farm site,

as of January, 1960, assuming it to be ready for shopping center use as evidenced by the Joseph B. Ward Feasibility Study, was between $15,000 and $20,000 per acre and in my judgment the value was about $17,500 per acre, which for 173.439 acres is $3,035,183, ..."

On direct, Fenton testified:

"Q. Would you continue with any other factors upon which your opinion as to the highest and best use of the property was based?

"A. Yes, as of the date of the appraisal, the property was zoned residential, but my investigation indicates that both the Town of Wickliffe, and the Village of Willoughby Hills would have been very cooperative in helping a developer put a regional shopping center on this property, and therefore I assume that the matter of proper zoning presented no problem " (Tr. 1364).

On cross, Fenton confirmed the fact that he assumed the rezoning of Nutwood rather than having weighed the possibility of rezoning (Tr. 1436). He also assumed that the property could be developed for regional shopping center purposes, rather than having weighed the possibility (Tr. 1436). If there were any doubt as to Fenton's assumption as to rezoning, it is resolved by his steadfast insistence that he considered as comparable to Nutwood only tracts which were already zoned commercial (Tr. 1469).

D. Fenton's Valuation Was Based on Improper Assumptions as to Future Policies of the Bureau of Roads

The rule that a witness may not base his valuation testimony on assumptions and speculation as to future policies of the Federal Government is well illustrated by Polson Logging Co. v. United States, 160 F. 2d 712, 716-717 (9th Cir. 1947); also see United States v. Cooper, 277 F. 2d 857, 860-862 (5th Cir. 1960). In Polson the Secretary of Agriculture sought to acquire lands for a road intended to service a national forest. The land comprised

one-hundred-foot strip some eleven miles in length. At trial e government witnesses testified that the highest and best use the property was for a fire trail, whereas the property owner's tnesses claimed the highest and best use was for a logging road r removal of timber from the Olympic National Forest. The trial urt's rejection of the property owner's testimony as to value s upheld:

> "... What policy the government or the Forest Service might pursue in the future was too speculative to affect the market value of the property while in private ownership." 160 F. 2d 712 at 717.

Fenton's opinion as to value was based in important part on s assumption that the Euclid Spur would be built and that the reau of Roads would approve a four-way interchange at Bishop ad (Tr. 1363, 1419). Fenton testified to no facts whatsoever ich would support his assumption that the interchange would be nstructed. He merely stated his broad general conclusion (Tr. 65).

This is exactly the type of testimony condemned by the Fifth rcuit in United States v. Cooper, supra. There, a hydroelectric gineer named Hall testified that the highest and best use of the operty in question was as part of a hydro project. The court mmented, "Hall's unsupported statement that "there was a good obability of using the Cooper lands in connection with other nds for the purpose of building a hydraulic dam there,' did not pply the lack of evidentiary facts on which the jury could make s own finding." (277 F. 2d 857, 860-861).

Fenton testified on direct that in his opinion the value of twood did not change materially between January 8, 1960 and

April 29, 1960 (Tr. 1386). Yet he was totally unfamiliar with the status of official planning for the spur or the interchange, either as of January 8 or April 29. The spur was to become part of U. S. Interstate 90 and as such, fell within the jurisdiction of the Bureau of Public Roads. However, Fenton could not answer any questions concerning action or planning by the Bureau of Roads for the spur or the interchange (Tr. 1421-24). He was even unfamiliar with the action taken by the Federal Government, as reported in the Cleveland Press for February 17, 1960 and the Cleveland Plain Dealer of March 1, 1960 (R. 1294-95). It was the latter article which Petti read on March 1, 1960 and reported to O'Neill on that day:

> "Petti phoned today and called attention to the article in this morning's Plain Dealer indicating, in his opinion, that not only the Outer Belt plans might be resubmitted to the Bureau of Roads in Washington but that the Euclid Spur might also, and that since the contract had not been let prior to January 1, 1960 of this year the whole diamond at Bishop Road might be ruled out under the new policy" (R. 1233-34).

In Exhibit 334, page 4, Fenton makes the glib assertion that "It is, therefore, assumed that this [interchange] would have been accepted by the market at that time, as highly probable." The interchanges were certainly not accepted or assumed by Petti or O'Neill as "highly probable". O'Neill wrote to the sisters on February 24, 1960, concerning the Cleveland Press article, as follows:

> "The newspaper reports have indicated that while the new Bureau of Roads interchange rule is operative from January 1st of this year, it may not be enforced against interchanges already planned and where the property involved has been

acquired and the contracts let before June 30th of this year. Four months is a short time in which to work out all the problems involved in acquiring the land for the Euclid spur, agreeing on compensation and damages and getting bids submitted and contracts let, and this whole operation will involve a great deal of hard and costly work.

"It seemed most urgent that we try to get a contract for the sale of the property with a substantial down payment completed before time runs against us on this new order. If the Bishop Road interchange were dropped, I would not be surprised to see a loss of $175,000 to $200,000 in the value of your property.

***

"Furthermore and especially in view of the risk of losing the Bishop Road exchange, I should have your long distance telephone numbers and cable addresses, and you should be available for any necessary signatures, including deeds, without any more delays than is involved in mail transport" (A.F., App. 75-77).

Fenton's client had not furnished him with the newspaper ticles and he had not bothered to obtain any information con- rning the interchanges. As he put it, "This is all new to me. don't know exactly what it is" (Tr. 1422).

Fenton's opinion as to the value of Nutwood for commercial rposes, based as it was on the assumption of the interchange, r. 1419) was worthless. It was based on his totally uninformed eculation as to what the Bureau of Roads might do. It was also rthless because the witness provided no factual predicate for s opinion.

The district judge's refusal to accept Fenton's opinion as the value of Nutwood (M.D., App. 10) was clearly within the urt's discretion. Any one of the grounds we urged in support our motion to strike would have been sufficient. Together,

the legal and factual deficiencies in Fenton's opinion testimony were overwhelming. The sloppiness which characterized Fenton's valuation testimony is reflected by the witness' admission at one point that he had made "a small error of a half a million dollars" in his appraisal (Tr. 1432).

VI. THE DISTRICT JUDGE PROPERLY HELD THAT NEITHER HILLTOP NOR THE SISTERS STATED A CLAIM OF ANTITRUST VIOLATION (Spec. of Error 1, Op. Br. 17, 19-27)

A. Procedural Background

Hilltop alleged in its complaint filed in January, 1963 that the identical facts which, it was charged, supported fraud and breach of contract against Smith, amounted to violation of the Ohio and Sherman antitrust statutes. Gist of the asserted violations was "preventing the development of the Nutwood property as a shopping center" (R. 7-8). Smith moved in February, 1963, before any discovery was had, for dismissal of the antitrust claims on the ground that they failed to state a claim (R. 17). The district judge, in a memorandum filed on May 13, 1963, denied the several parts of Smith's motion to dismiss "without prejudice to their being again raised by defendants after the entry of a pretrial order" (R. 21, Op. Br. App. A 1). More than a year later, in July, 1964, Hilltop filed an amended complaint, which joined The Austin Company as an additional defendant as to the Sherman Act allegations only (R. 100-114). Antitrust violation was asserted to be the prevention of the development of Nutwood or some other center competitive to Severance (R. 111-112). In November, 1964, Smith filed a motion for summary judgment, directed to the antitrust claims (R. 344). Austin filed a motion to dismiss (R. 441). The

strict judge thereupon ordered Hilltop and the sisters, who had ved in October, 1964 to join as plaintiffs (R. 328), to file statement of their factual contentions. In the same order the urt froze further discovery pending disposition of the pending tions (R. 530-32).

By this time, 6,066 pages of depositions had been taken, all ace the court's 1963 order denying dismissal (R. 1981-2006). out 5,000 pages of this total were taken by Hilltop in Washington, C., Cleveland; Austin, Texas; New York and Seattle. The remain- g pages consisted of depositions taken by Smith and Austin of lltop officials, the sisters and other witnesses. In addition, that point, some 422 deposition exhibits had been marked. It with the case in this posture that the district judge ordered rmination of further discovery until the pending motions could heard. Hilltop agreed to the freeze order in open court and proved for entry the ensuing written order (R. 522-23, 532). It led voluminous factual contentions (R. 651-691), in which it aimed that the conduct said to constitute an antitrust violation prevention of the development of Nutwood and another site, achwood, with which neither Hilltop nor the sisters alleged any nnection (R. 684). Also before the court upon the motions were copy of the brokerage agreement between Hilltop and the sisters . 364-68), and excerpts from the depositions of the sisters, sdames Ashcraft (R. 369-75) and Powell (R. 383-85) and other rts of the pretrial record.

In the brokerage agreement, approved by the sisters, Hilltop reed that it was "proceeding as a real estate broker under an clusive listing arrangement" (R. 364-65). In their testimony

the sisters emphatically disavowed any intention of developing Nutwood themselves or even of hiring someone to develop the property for them (R. 373-74). They were adamant against getting involved in any transaction except an outright sale of the property (R. 375, 384-85).

The district judge held a day long hearing on the Smith and Austin motions on March 11, 1965. The full transcript of that hearing is in the record on appeal (R. 2235-2448). The district judge observed with respect to his earlier denial of Smith's motion to dismiss that at that time, "I was not nearly as familiar with the issues in this case as I am now" (R. 2306). As this court said in Harman v. Valley National Bank, 339 F. 2d 564, 567 (9th Cir. 1964), quoting an earlier opinion, discovery is a useful tool "'for the sifting of allegations and the determination of the legal sufficiency of an asserted claim'". By March 11, 1965 there had been discovery aplenty into every phase of Hilltop's claims.

It is thus not quite accurate to state, as Hilltop does of the trial court's action in dismissing its antitrust claims, that "the Court reversed its 1963 decision" (Op. Br. 3). Nor, in view of Hilltop's express approval of the freeze order, does it seem fitting for it to complain that the trial judge somehow cut off its discovery prematurely or improperly (Op. Br. 25-26).

B. The Memorandum Decision

The district court's decision of March 29, 1965, insofar as it relates to antitrust, is reproduced as Appendix "B" to Hilltop's opening brief. The court's holding was on two grounds:

1. The factual contentions of Hilltop did not state an antitrust claim.

2. Assuming the antitrust violation as charged, the injury plained of was not proximately caused by such violation.

In view of the court's ruling, it found it unnecessary to pass the issues of "'effect in interstate commerce, the "target area" es cited by the parties, or the complicity of The Austin Company the alleged conspiracy.'" (Op. Br., App. B6).

On April 7, 1965, the court ordered the antitrust claims dis-sed (R. 950-55).

The trial court's action in dismissing the antitrust claims correct on both of the stated grounds. Moreover, the claims e deficient in that neither Hilltop nor the sisters were within t area of the economy, sometimes called the "target area", which ld be endangered by the alleged breakdown of competitive con-ions. We shall first review the record which supports the rul-that the contentions did not amount to a claim of antitrust lation, and shall then discuss together the district court's ding of no causal relation and the connected "target area" doc-ne.

C. Taken at Face Value, Hilltop's Contentions Do Not State a Claim in Antitrust

Hilltop's contentions are a combination of conclusions amount-only to antitrust bromides and claims which would amount, if ved, only to common-law fraud or breach of contract. Conceding argument, as Hilltop suggests (Op. Br. 23), that common-law aches may also constitute breaches of the antitrust laws, it es not follow that every violation of a private right confers itrust standing on the alleged victim. Yet, if Hilltop's con-tions were held to state a claim, then most any breach of a

routine business contract could justify a treble damage trial. But the courts have refused to hold that mere allegations of breach of contract or deceit by a competitor, stated in conventional antitrust language, will state an antitrust claim. Norville v. Globe Oil & Ref. Co., 303 F. 2d 281, 282 (7th Cir. 19 Parmelee Trans. Co. v. Keeshin, 292 F. 2d 794, 804 (7th Cir. 1 One glaring deficiency in Hilltop's claims is that the acts co plained of, even if they occurred, were not reasonably calcula to restrict the flow of interstate commerce. In the light of cases as Page v. Work, 290 F. 2d 323 (9th Cir. 1961), cert. de 368 U.S. 875 (1961) and Savon Gas Stations No. 6, Inc. v. Shel Oil Co., 203 F. Supp. 529 (D. Md. 1962), aff'd. 309 F. 2d 306 Cir. 1962), cert. den. 372 U.S. 911 (1963), both of which were antitrust cases dismissed short of trial, it is perfectly clea that allegation of some specific facts which would show some e on interstate commerce is essential to state an antitrust clai Hilltop's contentions (R. 681-90), which are restated in somew expanded form in its opening brief (p. 5-17), do not suggest h the furnishing by Smith, without Austin's knowledge, of a non- objective report on Nutwood could have any adverse effect upon interstate commerce. Whether Smith or Austin indulge in inter activities, as alleged (Op. Br. 6) is beside the point. For e ample, in the Savon case, supra, the district judge held, con- sistent with established doctrine, that an antitrust pleading be tested by "... the incidence and substantiality of the alle restraint ..., not the corporate activities of defendant...." F. Supp. 529, 534). Here, the record shows that the trading a

neither Severance nor Nutwood would cross state lines (Ex. 29, p. 159, Ex. 11, Part III). Much the same arguments Hilltop makes out the possible tangential effects Smith's alleged conduct might ve on interstate commerce (Op. Br. 7) were rejected by both the strict judge (203 F. Supp. 533) and the Court of Appeals (309 2d 308-09) in Savon as to the shopping center there involved. so see Foster & Kleiser Co. v. Special Sign Co., 85 F. 2d 742, 0 (9th Cir. 1936) and Gaylord Shops Inc. v. Pittsburgh Miracle le, etc.,219 F. Supp. 400 (S.D. Pa. 1963).

Hilltop's labored effort to divide the Austin-Smith relation-ip into four stages (Op. Br. 8-14) is apparently directed toward single purpose, to show that Smith and Austin tried to get two partment stores to locate in Severance, with the alleged purpose making a merchandising center which would dominate the area. rely, this does not charge a violation of the Sherman Act. Most opping centers built in the last few years have had more than one partment store as a tenant. For example, seven of the centers sted by Smith in its Nutwood memorandum as competitive to that te had more than one department store and one of these, Southgate, d three department stores, namely, Sears, Taylor and Penney (Ex. , App. 160). Parenthetically, we note that Hilltop had tried nce February, 1959, to land two department stores at Nutwood to rovide insurance against significant competition of a regional ture" (R. 1146; Ex. 348B, reprinted in Smith Op. Br. following 22; Ex. 212A). As the court observed, and Hilltop's counsel firmed, it was Smith's success in getting Higbee and Halle to cate in the same center which induced Hilltop to hire Smith . 2304). But even if all the competing department stores in

Cleveland were persuaded to locate branches in the same center that would not stifle competition. The fact of having a common landlord would not logically intensify or diminish their competition. If the same property owner rented adjacent space downtown to Woolworth and Kresge, this would raise no inference of anti-trust violation, even though the owner might boast that his "ce dominated the variety store field in the area.

Hilltop charges that it was not permitted full discovery (Br. 14-15, 25). But it agreed to have the pending motions hear on the record as it was. Further, the second fatal defect which the court found in Hilltop's antitrust contentions, lack of sta to sue, was not curable by any further discovery from either Sa or Austin.

D. The Court Properly Held There Could Be No Causal Connection Between the Claimed Violation and the Claimed Injury

The district judge ruled that neither Hilltop nor the sist showed in their contentions any causal connection between the claimed Sherman Act violation and the damages said to have been incurred (Op. Br., App. B3-5). The close tie between the neces that a plaintiff establish such causal connection and that he l within the sector of the economy which would be affected by the claimed breakdown in competition is shown by the following stat ments of the Fourth Circuit in South Carolina Council of Milk P ducers, Inc. v. Newton, 360 F. 2d 414 (1966):

> "... If a plaintiff can show himself within the sector of the economy in which the violation threatened a breakdown of competitive conditions and that he was proximately injured thereby, then he has standing to sue under section 4." (360 F. 2d at 418).

****

> "The pivot of decision presently is whether the defendants' asserted conduct was the proximate cause of the plaintiffs' asserted injury. If the damage was merely incidental or consequential, or if the defendants' antitrust acts are so removed from the injury as to be only remotely causative, the plaintiffs have not been injured 'by reason of anything forbidden in the antitrust laws' as contemplated by the Clayton Act." (360 F. 2d at 419).

The so-called "target area" doctrine was defined by this

ırt in Conference of Studio Unions v. Loew's, Inc., 193 F. 2d

54-55 (9th Cir. 1952), cert. den. 342 U.S. 919 (1952):

> "... A conspiracy may have many purposes and objects; the conspirators may perform an almost infinite variety of acts in furtherance of the conspiracy; but, in order to state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured 'by reason' of anything forbidden in the anti-trust laws.
>
> "Such a construction is in accordance with the basic and underlying purposes of the anti-trust laws to preserve competition and to protect the consumer. Recovery and damages under the anti-trust law is available to those who have been directly injured by the lessening of competition and withheld from those who seek the windfall of treble damages because of incidental harm."

Neither Hilltop nor the sisters was within the area of the

ɔnomy which would be endangered by the alleged breakdown of

ıpetitive conditions. Therefore, even assuming (1) that Hilltop

ıted a claim of antitrust violation, and (2) that this court

erturns the district judge's finding that Hilltop failed to

ɔve that Ridge Hills paid less than full value for Nutwood,

ere would still be one necessary ingredient missing from Hilltop's

:itrust claims. The pretrial record before the district judge

claimed violation and the claimed injury.

In the vast majority of cases where an antitrust violation has been claimed, the plaintiff has been an active member of the relevant industry. In a few cases the plaintiff has asserted that he either had been barred from entering or forced out of an industry by the claimed monopolistic practice. Finally, in a few cases, courts have been called upon to determine the relative proximity of the plaintiff to the target area. As examples, courts have held too remote from the area, suppliers as to the industry supplied, Volasco Prod. Co. v. Lloyd A. Fry Roofing Co., 308 F. 2d 383, 395 (6th Cir.1962), cert. den. 372 U.S. 907 (1963); landlords as to the business of lessees, Lieberthal v. North Countr Lanes, Inc., 221 F. Supp. 685 (S.D.N.Y. 1963), aff'd. 332 F. 2d 269 (2nd Cir.1964); patent licensors as to the business of licensees, Productive Inventions, Inc. v. Trico Prod. Corp., 224 F. 2d 678 (2nd Cir. 1955), cert. den. 350 U.S. 936 (1956); stockholders as to the business of corporations, Walder v. Paramount Publix Corp., 132 F. Supp. 912, 916 (S.D.N.Y. 1955); and labor unions and their members as to the business of the members' employers, Conference of Studio Unions v. Loew's,Inc., supra.

In the face of these holdings, how can anyone seriously argue that the claim that Smith and Austin conspired "for the purpose of preventing the development of competitive regional shopping centers in the eastern suburbs of Greater Cleveland, including those at Beachwood and at the subject Nutwood property" (Op. Br.8-9) is somehow proximately related to Hilltop's alleged failure to earn a bigger brokerage commission than the $56,580.75 it received on the sale to Ridge Hills? (R. 1238). Hilltop did not pretend to

e been in or to have been barred from the shopping center
iness. And if it be looked upon as a supplier of services,
persons supplied were not in the shopping center business
disclaimed any intention of going into it. Hilltop, therefore,
no conceivable standing to win treble damages for the alleged
lation, even if properly stated.

Nor were the sisters in any better position. They were not
the shopping center business. They had no intention of develop-
Nutwood Farms themselves for any purpose. How can it be
ued that they are proximately injured by conduct claimed to
train competition in "regional shopping centers in the eastern
urbs of Cleveland?" At the very most the sisters might be
otely or incidentally injured. Several of the theoretical
t plans for development of Nutwood pictured restaurants, gas
tions, motels, bowling alleys, medical buildings and super-
kets (Ex. 235, plate following p. 4, 212 A, 211A). Would this
e the sisters a claim to treble damages if competition broke
n in the restaurant, gas station, motel, bowling alley, medical
grocery business in eastern Cleveland? Hilltop and the sisters
e unable to prove in a full trial that Nutwood had any poten-
lity as a shopping center (O.O., App. 5), or that the property
uld be valued as such (M.D., App. 10). But even had they proved
wood to have great potentiality for such purpose, they would
ll have lacked requisite standing to sue.

The argument of Hilltop and the sisters all proceeds from the
e false premise - that the "target area" doctrine requires only
t the plaintiff allege that defendant's conduct is aimed at
uring the plaintiff. Of course, if this were so, every plain-

tiff who asserted breach of contract could state a treble d
claim, on the ground that the defendants' conduct was aimed
him. But the "target area" doctrine requires more -- that
alleged injury be proximately caused by the claimed antitru
violation.

Hilltop has cited Harman v. Valley National Bank, 339 F
564 (9th Cir. 1964) (Op. Br. 20-21). The Harman case has,
think, little to do with the instant problem. In that case
complaint was dismissed at the outset. Here, the district
refused such dismissal. Instead he acted only after two ye
of discovery, including some 5,000 pages of depositions by
plaintiffs, and after the plaintiffs were afforded an oppor
to state detailed factual contentions. In Harman this cour
plied that the course followed in the instant case was the
one to follow by quoting the words of Judge Barnes that "a
to dismiss is not 'the only effective procedural implement
the expeditious handling of legal controversies'". (339 F.
567).

In Harman this court did refer to the "target area" doc
and cited Pollock, The "Injury" and "Causation" Elements of
Treble-Damage Anti-Trust Action, 57 Nw. U.L.Rev. 691 (1963)
In that article, Pollock, a former government antitrust law
states:

> "... With rare exceptions, the courts have 'drawn the line', explicitly or otherwise, so as to limit the treble damage remedy to plaintiffs in the 'target area'". (57 Nw. U.L.Rev. 691 at 704).

e Peller v. International Boxing Club, 227 F. 2d 593 (7th Cir. 55); Duff v. Kansas City Star Co., 299 F. 2d 320 (8th Cir. 1962) d Rayco Mfg. Co. v. Dunn, 234 F. Supp. 593, 597 (N.D. Ill 1964).

The district judge, during the March 11, 1965 argument on titrust, summed up well the situation shown by the pretrial cord. When counsel for Hilltop charged that Smith issued a alse report to us, who would have challenged their dominance ..." e following colloquy occurred:

> "THE COURT: Oh, no, you were not about to challenge their dominance at all. You wanted to sell your property to somebody else who might challenge it.
>
> "MR. STEPHAN: Well, not quite, your Honor. I think really that what you raise is a good point and it needs clarification. It needs a good deal of clarification, because the letter --
>
> "THE COURT: Your sisters said definitely, from all that appears here before me now, that they just weren't interested in getting into the shopping center business.
>
> "MR. STEPHAN: Your Honor, that is not disputed, in the light of their then hindsight." (R. 2297-98).

Neither Hilltop nor the sisters stated or could state a erman Act treble-damage claim. Since, as Hilltop observes p. Br. 5-6), the requirements of standing under the Ohio anti- ust law, known as the Valentine Act, are at least as onerous under the Sherman Act, it follows that neither Hilltop nor the sters could state a double damage claim under the Ohio Act. Their ck of standing, whether based on a proximate causation or target ea analysis, is fatal.

VII. CONCLUSION

Unless this court should hold that the findings assailed on

this appeal (Op. Br. 17-18) are clearly erroneous, it need not consider the antitrust claims. Failure of Hilltop to offer substantial evidence that the Smith analysis was wrong or that it damaged anyone is dispositive of this appeal.

Hilltop has ballooned out of all proportion the fact that Hilltop was not told that Smith had started negotiations with Austin which, if successful, would make Smith owner or part owner of Severance. As O'Neill wrote, before Smith was hired, "Treiger emphasized the possible conflict of interest berween his firm's loyalty to Austin and Severance and any recommendations he might make to the promoters of the Nutwood project." Nevertheless, O'Neill wrote, "it was considered worth while to get Smith's survey and recommendations." (A.F., App. 48). It seems to us entirely illogical to suggest that Hilltop would not have hired Smith if it had known of the Austin negotiations. In its answering brief, Hilltop asserts, "Petti knew nothing of the impending Smith purchase, but thought Higbee and Halle's location at Severance was an accomplished fact because of the February 22, 1959 newspaper announcement." (Ans. Br. 19). Petti always held the view that Severance, which he thought an accomplished fact, and Nutwood were non-conflicting projects (Petti Tr. 289-96, 320-22). He believed that Severance was in the carriage trade suburbs and Nutwood was in a distinct working class area (Tr. 293). When Treiger told Petti in September, 1959, before Smith was hired, "that we are working on the Longwood [Severance] property and felt there might be some conflict in our own position", Petti replied, "<u>that he did not think that there would be</u> because he did not think that his

operty would pull very far from the west." (A.F., App. 44) mphasis added). In June, 1961, some eighteen months after re- iving the Smith study, Petti had not modified his view. He ote to David May, "I see little conflict [with Cedar Center] as ch of the trading areas is distinct in itself" (A.F., App. 88). Nutwood did not conflict with Cedar Center, it would not con- ict with Severance (See plate 1, Smith Op. Br.). Obviously, tice to Petti and O'Neill that Smith, in addition to its full yalty to Severance as advisor to Austin, might also purchase this n-competing property, would not have deterred them from hiring ith.

For the reasons herein stated, the district judge's findings tacked by Hilltop should be upheld. Further, his action in smissing the spurious antitrust claims advanced by Hilltop should kewise be affirmed.

Respectfully submitted,

RICHARD S. WHITE

GERALD G. DAY

Attorneys for Cross-Appellees
Larry P. Smith, et al

1610 Washington Building
Seattle, Washington 98101

SELL, PAUL, FETTERMAN, TODD & HOKANSON
0 Washington Building
ttle, Washington 98101

Of Counsel